

Chapter 1

Introduction and background

Referral

1.1 On 15 September 2016 the Senate referred the following matter to the Senate Legal and Constitutional Affairs References Committee (the committee) for inquiry and report by 8 November 2016:

the nature and scope of the consultations prior to the making of the Legal Services Amendment (Solicitor-General Opinions) Direction 2016, with particular reference to:

- (a) the extent to which any consultation drew on the knowledge or expertise of persons having expertise in the relevant fields;
- (b) whether persons likely to be affected by the proposed instrument had adequate opportunity to comment on its content;
- (c) what was the form of the consultation, including whether any written submissions were sought;
- (d) the timing of when any consultation occurred; and
- (e) any related matter.¹

Conduct of inquiry

1.2 In accordance with usual practice, the committee advertised the inquiry on its webpage, and also wrote to a number of organisations and individuals inviting written submissions by 3 October 2016. The committee received 7 submissions, listed at Appendix 1.

1.3 The committee held a public hearing in Canberra on 5 October 2016, and an additional hearing in Canberra on 14 October 2016. A list of the witnesses who appeared at the public hearing is provided at Appendix 2, and additional information received by the committee at Appendix 3.

Structure of this report

1.4 There are four chapters in this report.

1.5 Chapter 1 describes the context and background to the inquiry.

1.6 Chapter 2 discusses the views of the Attorney-General in relation to the consultations described in the terms of reference, and the relevant views of legal experts.

1.7 Chapter 3 discusses the Solicitor-General's views on the consultations undertaken by the Attorney-General that are described in the terms of reference.

1.8 Chapter 4 outlines the committee's views and recommendations.

¹ *Journals of the Senate* No. 7, 15 September 2016, pp. 214-215.

Relevant legislation

1.9 Section 12 of the *Law Officers Act 1964* (Cth) (the Law Officers Act) provides that:

The functions of the Solicitor General are:

- (a) to act as counsel for:
 - (i) the Crown in right of the Commonwealth;
 - (ii) the Commonwealth;
 - (iii) a person suing or being sued on behalf of the Commonwealth;
 - (iv) a Minister;
 - (v) an officer of the Commonwealth;
 - (vi) a person holding office under an Act or a law of a Territory;
 - (vii) a body established by an Act or a law of a Territory; or
 - (viii) any other person or body for whom the Attorney General requests him or her to act;
- (b) to furnish his or her opinion to the Attorney-General on questions of law referred to him or her by the Attorney-General; and
- (c) to carry out such other functions ordinarily performed by counsel as the Attorney General requests.

1.10 Section 55ZF of the *Judiciary Act 1903* (Cth) provides that the Attorney-General may issue directions to apply to Commonwealth legal work, either generally or in relation to a particular matter. The Legal Services Directions 2005 are binding rules that provide obligations with respect to how Commonwealth agencies should conduct themselves during litigation. Guidance Notes are issued to assist Commonwealth agencies comply with their obligations.²

1.11 Section 17 of the *Legislation Act 2003* (Cth) provides that rule-makers should consult before making legislative instruments:

- (1) Before a legislative instrument is made, the rule-maker must be satisfied that there has been undertaken any consultation that is:
 - (a) considered by the rule-maker to be appropriate; and
 - (b) reasonably practicable to undertake.
- (2) In determining whether any consultation that was undertaken is appropriate, the rule-maker may have regard to any relevant matter, including the extent to which the consultation:

2 Attorney-General's Department, *Legal Services Directions and Guidance Notes*, <https://www.ag.gov.au/LegalSystem/LegalServicesCoordination/Pages/Legalservicesdirectionsandguidancenotes.aspx> (accessed 1 November 2016).

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- (a) drew on the knowledge of persons having expertise in fields relevant to the proposed instrument; and
 - (b) ensured that persons likely to be affected by the proposed instrument had an adequate opportunity to comment on its proposed content.

(3) Without limiting, by implication, the form that consultation referred to in subsection (1) might take, such consultation could involve notification, either directly or by advertisement, of bodies that, or of organisations representative of persons who, are likely to be affected by the proposed instrument. Such notification could invite submissions to be made by a specified date or might invite participation in public hearings to be held concerning the proposed instrument.

Background

1.12 On 4 May 2016 the Attorney-General tabled the Legal Services Amendment (Solicitor-General Opinions) Direction 2016 (the Direction) in the Senate.³ The Explanatory Statement to the Direction stated that the purpose of the Direction was to clarify the circumstances in which an opinion on a question of law may be sought from the Solicitor-General pursuant to paragraph 12(b) of the Law Officers Act and to regularise the process by which referrals to the Solicitor-General for opinions are made.⁴

1.13 The key provision of the Direction, at clause 10B.3 of Schedule 1, states that:

No person or body referred to in paragraph 12(a) of the Law Officers Act, other than the Attorney-General, may refer a question of law to the Solicitor-General except with the consent of the Attorney-General.

1.14 The Direction further specifies that if such a person or body wishes to refer a question of law to the Solicitor-General, they must seek the Attorney-General's written (signed) consent to do so, with the request copied to the Attorney-General's Department (Department). Should the Solicitor-General receive a reference for advice without the signed consent of the Attorney-General, the Solicitor-General must seek the Attorney-General's consent to (or rejection of) it before proceeding. As noted above, the Direction applies to all persons and bodies referred to in paragraph 12(a) of the Act; while the Legal Services Directions otherwise only apply to 'non-corporate Commonwealth entities'. The Explanatory Statement stated that this was 'not expected to have any practical impact' on the operation of the Direction.⁵

1.15 In the Explanatory Statement, the Attorney-General advised the Senate that before the instrument was made, he 'considered the general obligation to consult'

3 *Journals of the Senate* No. 153, 4 May 2016, p. 4246.

4 Legal Services Amendment (Solicitor-General Opinions) Direction 2016, Explanatory Statement (ES), p. 1.

5 ES, p. 3.

imposed under section 17 of the *Legislation Act 2003* (Cth)⁶ and, '[a]s the Direction relates to the process for referring a question of law to the Solicitor-General, the Attorney-General has consulted the Solicitor-General'.⁷

1.16 The Attorney-General also answered numerous questions in the Senate about this matter between 12 September 2016 and 12 October 2016. These responses included:

[Senator Collins] ...The Solicitor-General has said, 'I wasn't consulted about the direction'. Is the Solicitor-General correct?

[Attorney-General] ...I consulted the Solicitor-General about the matter at meeting in my office on 30 November 2015. I invited the Solicitor-General to put his ideas in writing, which he did, and I considered those as well. When I made the direction, I was advised by my department that the requirements of section 17 of the *Legislation Act* had been satisfied.

[Senator Collins] ...I refer to the Attorney-General's answer in question time on 12 September in which he claimed that the Solicitor-General was consulted on the direction 'during the course of a meeting in my office on 30 November 2015'. Does the Attorney-General stand by this statement?

[Attorney-General] Obviously I do, Senator, and I have just repeated it. That is my position.⁸

Public discussion

1.17 Both the content of the Direction and the background to its tabling became the subject of media attention in June 2016. On 16 June 2016 the Australian Financial Review (AFR) reported that the Solicitor-General had challenged the Attorney-General's claim that the Solicitor-General had been consulted in relation to the Direction. The AFR report stated that the Solicitor-General had written to the Attorney-General on 11 May 2016 'noting that he did not accept that he had been consulted as Senator Brandis had asserted'.⁹

1.18 Citing 'an extensive record of correspondence, meeting minutes and reports about the behind-the-scenes meetings about the [Direction]', the AFR reported that in November 2015 the Attorney-General met with the Solicitor-General, the Secretary of the Attorney-General's Department and the Australian Government Solicitor, at which time the Solicitor-General raised concerns about the management of requests for advice that were submitted to him. Pursuant to an agreement at the meeting, suggested amendments to the guidance notes for such advice were provided to the

6 It is noted that the Act is incorrectly named in the Explanatory Statement as the *Legislative Instruments Act 2003*.

7 ES, pp. 1–2.

8 Senator the Hon George Brandis QC, Attorney-General, *Senate Hansard*, 10 October 2016, p. 37.

9 Laura Tingle, 'George Brandis in bitter legal fight goes to rule of law', *Australian Financial Review*, 16 June 2016, <http://www.afr.com/news/politics/george-brandis-in-bitter-legal-fight-goes-to-rule-of-law-20160616-gpkvyy> (accessed 1 November 2016).

Attorney-General in late March. No response was received from the Attorney-General before 4 May, when the Direction was tabled and the Solicitor-General advised accordingly. The AFR article also stated that 'a range of officials...were instructed not to consult the Solicitor-General or his office or to notify him [in advance] of the change'.¹⁰

1.19 In response to an enquiry from the AFR, the Attorney-General's office stated that there was 'uncertainty in government about the procedure for briefing the Solicitor General', and that the new arrangement sought to clarify the relevant procedures. The office said that following the November 2015 meeting and subsequent correspondence with the Solicitor-General and other senior officials, the Attorney-General 'considered the suggestions carefully and incorporated some, but not all of them, in the final documents'. The Attorney-General described the Direction as 'inspired by a request by the Solicitor-General himself, to regularise the practice and make it consistent with the statutory requirement that is section 12(b) of the [Law Officers Act]'.¹¹

Disallowance motion in the Senate

1.20 On 13 September 2016, Senator the Hon Penny Wong, Leader of the Opposition in the Senate, gave notice of a motion to disallow the Direction, to be moved on the next sitting day.¹² In accordance with the *Legislation Act 2003* (Cth), unless the motion is resolved or withdrawn by 28 November 2016, the Direction will be disallowed on that date.

Consideration by the Senate Regulations and Ordinances Committee

1.21 On 14 September 2016, the Senate Standing Committee on Regulations and Ordinances (Regulations and Ordinances Committee) advised the Senate of its concern that the Direction contained matters more appropriate for parliamentary enactment (i.e. primary legislation) than a legislative instrument. Noting that subsections 12(a)(i) to (vii) of the Law Officers Act allocated functions to the Solicitor-General that did not involve the Attorney-General, the Regulations and Ordinances Committee stated that:

...in effect, this direction appears to narrow the scope of the Solicitor-General's functions prescribed under subsections 12(a)(i)-(a)(vii)...because, for example, ministers or officers of the Commonwealth can no longer seek the advice of the Solicitor-General on questions of law without the consent of the Attorney-General, unless the question of law arises in the course of a matter in which the Solicitor-General is acting as counsel.

10 Laura Tingle, 'George Brandis in bitter legal fight goes to rule of law', *Australian Financial Review*, 16 June 2016, <http://www.afr.com/news/politics/george-brandis-in-bitter-legal-fight-goes-to-rule-of-law-20160616-gpkvyy> (accessed 1 November 2016).

11 Laura Tingle, 'George Brandis in bitter legal fight goes to rule of law', *Australian Financial Review*, 16 June 2016, <http://www.afr.com/news/politics/george-brandis-in-bitter-legal-fight-goes-to-rule-of-law-20160616-gpkvyy> (accessed 1 November 2016).

12 *Journals of the Senate* No. 5, 13 September 2016, p. 166.

Given this, the [Regulations and Ordinances] committee considers that the changes effected by the direction may be regarded as more appropriate for parliamentary enactment.¹³

Resignation

1.22 On 24 October 2016 the Solicitor-General announced that he was resigning from his position, effective from 7 November 2016. In a letter informing the Attorney-General of his resignation, the Solicitor-General stated that

...the best interests of the Commonwealth can be served only when its first and second Law Officers enjoy each other's complete trust and confidence within a mutually respectful relationship. When such a relationship is irretrievably broken, as is the case here, and each Law Officer holds a term of office established by the Constitution or statute which will not expire in the near future, there must be some resolution to the impasse...My decision does not amount to a withdrawal of any position I have taken in relation to matters of controversy between us, including before the Senate Legal and Constitutional Affairs References Committee.¹⁴

1.23 In response, the Attorney-General thanked the Solicitor-General for his service:

I agree with the view, expressed in your letter, that in the circumstances this is the proper course for you to take. I take this opportunity to thank you for your service as the Solicitor-General of the Commonwealth and wish you well in your future career.¹⁵

A note on terminology

1.24 In the remainder of this report, a reference to the Solicitor-General is to Mr Justin Gleeson SC, Solicitor-General of the Commonwealth of Australia from 14 February 2013 to 7 November 2016, unless otherwise specified.

13 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor* 6 of 2016, 14 September 2016, pp. 24-25.

14 Mr Justin Gleeson SC, Solicitor-General of the Commonwealth of Australia to Senator the Hon George Brandis QC, Attorney-General of the Commonwealth of Australia, correspondence sent 24 October 2016.

15 Mr Justin Gleeson SC, Solicitor-General of the Commonwealth of Australia to Senator the Hon George Brandis QC, Attorney-General of the Commonwealth of Australia, correspondence sent 24 October 2016.